

**U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FILED**

AUG 24 2005

CLERK, U.S. DISTRICT COURT  
By \_\_\_\_\_ Deputy

Plaintiff,

VS.

SAM'S EAST, INC. d/b/a SAM'S  
CLUB, INC,

**Defendants.**

§ § § § § § § § § § § § § § § §

NO. \_\_\_\_\_

3 05 CV 1708. - M

Plaintiff Walter G. Smith, d/b/a Impact Images (“Plaintiff”) files this complaint against SAM’S CLUB EAST, INC. d/b/a SAM’S CLUB, INC. (“SAMS”).

1. This is a Copyright infringement claim that arises out of the Defendant's unauthorized sale of shirts that bear Plaintiff's Registered image of former Dallas Cowboys star, Emmitt J. Smith, entitled "Emmitt Smith Defending the Star®".

2. Plaintiff is a citizen of the State of Texas. He resides at 10905 Shadow Brook Lane, Frisco, Texas 75035.

3. Defendant, SAMS, is a corporation duly organized and existing under the laws of the State of Delaware, that is duly authorized to conduct business in the State of Texas and which may be served with process by serving its registered agent, Corporation Service Company, at 800 Brazos, Austin, Texas 78701.

### **III. JURISDICTION AND VENUE**

4. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338.

5. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because a substantial portion of the actions or omissions giving rise to Plaintiff's claims arose in this District.

### **IV. FACTUAL BACKGROUND**

6. On or about September 28, 2000, Plaintiff photographed Emmitt J. Smith kneeling on the star located in the center of the Dallas Cowboys' home field, Texas Stadium (the "Image").

7. On or about August 16, 2001, Plaintiff displayed the Image to the Dallas Cowboys Football organization (the "Cowboys") for potential purchase.

8. The Cowboys purchased copies of the photograph, at a total cost of \$6,500, for sale through its Dallas Cowboys Pro Shops retail locations.

9. In or about May 2002, the Cowboys contacted Plaintiff regarding its potential use of the Image in connection with season tickets for the 2002 season.

10. On or about May 21, 2002, in reliance on the Cowboys' representations concerning proper attribution in connection with their prospective use of the Image, Plaintiff provided the Cowboys a digital file of the Image.

11. The Cowboys chose not to use the Image, as authorized; however, in or about September 2002, the Cowboys, without authorization from Plaintiff, began reproducing, adapting, distributing, disseminating, selling and/or otherwise exploiting unauthorized copies of and/or derivative works of the Image.

12. Specifically, the Cowboys misappropriated the Image and copied it onto t-shirts, sweatshirts, and other memorabilia (collectively, the “Infringing Items”) which the Cowboys sold for profit at certain of the Cowboy’s retail establishments and on certain of the Cowboys’ World Wide Web/Internet sites (“Internet Sites”).

13. On February 26, 2004, Plaintiff registered the Image, which he entitled “Emmitt Smith Defending the Star,” with the Register of Copyrights. The Certificate of Registration bears the number VA 1-221-136, a true and correct copy of which is attached hereto as Exhibit “A.”

14. On March 18, 2004, Plaintiff brought suit in the United States District Court for the Northern District of Texas, Dallas Division (the “Cowboy Litigation”), against the Cowboys, Dallas Cowboy Merchandising, Ltd. (“DCM”), Dallas Cowboys Pro Shops, L.P. (“Pro Shops”), Esports Partners, Inc. (“Esports”), Reebok International, Ltd. (“Reebok”), Emmitt Zone, Inc. (“Zone”), and Advantage Marketing Group, Inc. (“Advantage”) (collectively the “Cowboy Defendants”) for Copyright infringement connected to their reproduction, adaptation, distribution, dissemination, sale and/or exploitation of unauthorized copies of and/or derivative works of the Image.

15. During discovery, documents produced by Reebok showed a total of 43,334 infringing t-shirts and sweatshirts were manufactured.

16. Of the 43,334 infringing items, the Reebok documents show 42,914 were shipped and received by Dallas Cowboys Merchandising and a total of 242 infringing items remained on hand in Reebok’s warehouse.

17. DCM and DCPS, however, produced documents showing they purchased only 32,994 infringing items from Reebok.

18. Accordingly, there are at least 10,340 infringing t-shirts and sweat shirts that the Cowboys Defendants could not account for.

19. Ultimately, the parties settled (the "Settlement") the Cowboy Litigation. Pursuant to the well-publicized settlement, the Cowboy Defendants agreed to pay Plaintiff the sum of \$275,000.00 in exchange for a release of Plaintiff's claims against the Cowboy Defendants.

20. The Plaintiff did not grant the Cowboy Defendants a license to manufacture, distribute or sell any item bearing the Image.

21. In or about June 2005, Plaintiff discovered that SAMS obtained some quantity of the Infringing Items and offered them for sale at one or more of its North Texas locations.

22. As of the filing of this Complaint, SAMS continues to sell the Infringing Items at its various retail locations in North Texas and, perhaps, elsewhere.

**V. CAUSE OF ACTION**  
**(COPYRIGHT INFRINGEMENT)**

23. Plaintiff owns the Image and has the exclusive rights to copy, to distribute and to transmit the Image in the United States.

24. The Image is Registered with the United States Copyright Office.

25. At all times relevant herein, Plaintiff has complied with the Copyright Act, 17 U.S.C. §§ 101, *et seq.*, and has secured the exclusive rights and privileges in and to the Image.

26. SAMS has, without authorization from Plaintiff, sold, distributed, disseminated, and otherwise exploited unauthorized copies of and derivative works of the Image on t-shirts and sweatshirts offered for sale to the public by SAMS.

27. With the exception of a license granted to the Cowboys in June 2002 to sell a set quantity of still photographs of the Images, Plaintiff has not licensed any rights to anyone, including SAMS, to reproduce or to distribute the Image in any manner whatsoever.

28. SAMS' conduct infringes Plaintiff's exclusive rights in his Copyright, including without limitation Plaintiff's rights under 17 U.S.C. § 106.

29. SAMS willfully engaged in, and is willfully engaging in, the acts complained of with oppression and malice, and has been so engaged in with a total and conscious disregard for Plaintiff's intellectual property rights.

30. By reason of SAMS' infringement and threatened infringement, and as a direct and proximate result thereof, SAMS has realized and continues to realize profits and other benefits that rightfully belong to Plaintiff.

31. Plaintiff is therefore entitled to recover from SAMS either statutory damages pursuant to 17 U.S.C. § 504(c), or actual damages sustained by Plaintiff as a result of SAMS' Copyright infringement, including all revenue from the sale of the Infringing Items.

32. Pursuant to 17 U.S.C. § 505, Plaintiff is entitled to recover his full costs, including reasonable attorneys' fees, from SAMS.

## **VI. PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays as follows:

1. That upon Plaintiff's election, Plaintiff will be awarded either his actual damages and/or a disgorgement of SAMS' revenue from the sale of the Infringing Items, plus interest, or alternatively, an award of statutory damages in the amount of \$30,000.00

pursuant to 17 U.S.C. § 504(c)(1), to be increased to \$150,000.00, as permitted by 17 U.S.C. § 504 (c)(2), because of SAMS' willful infringement;

2. That the Court award Plaintiff his full costs, including reasonable attorneys' fees, pursuant to 17 U.S.C. § 505; and

3. That the Court grant such other and further relief as it deems just and proper.

Dated: 8/24/05

Respectfully submitted,

By: 

**JAMES E. DAVIS**  
State Bar No. 05504200  
**BRAD C. MALL**  
State Bar No. 24007593

**DAVIS MUNCK, P.C.**  
13155 Noel Road  
900 Three Galleria Tower  
Dallas, TX 75240  
Telephone: 972-628-3600  
Facsimile: 972-628-3616

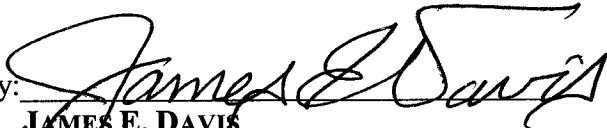
**ATTORNEYS FOR PLAINTIFF**

**DEMAND FOR JURY TRIAL**

Plaintiff demands a trial by jury.

Dated: 8/24/05

Respectfully submitted,

By: 

**JAMES E. DAVIS**

State Bar No. 05504200

**BRAD C. MALL**

State Bar No. 24007593

**DAVIS MUNCK, P.C.**

13155 Noel Road

900 Three Galleria Tower

Dallas, TX 75240

Telephone: 972-628-3600

Facsimile: 972-628-3616

**ATTORNEYS FOR PLAINTIFF**

## Certificate of Registration



This Certificate issued under the seal of the Copyright Office in accordance with title 17, United States Code, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

*Marybeth Peters*

Register of Copyrights, United States of America

**FORM VA**

For a Work of the Visual Arts

UNITED STATES COPYRIGHT OFFICE

VA 1-221-136

EFFECTIVE DATE OF REGISTRATION

2-26-03

ATE CONTINUATION SHEET

1

Title of This Work

Ernst Smith Defending the Star

NATURE OF THIS WORK See Instructions

Photograph

Previous or Alternative Titles

Publication as a Contribution If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. Title of Collective Work

If published in a periodical or serial give: Volume Number Issue Date On Pages

2

NAME OF AUTHOR

a Walter Glen Smith

DATES OF BIRTH AND DEATH

Year Born Year Died

1965

Was this contribution to the work a "work made for hire"?

☐ Yes  
☒ No

Author's Nationality or Domestic

Name of Country

OR ☒ Citizen of United States  
☐ Domestic in

Was This Author's Contribution to the Work

Anonymous? ☐ Yes ☒ No

Pseudonym? ☐ Yes ☒ No

If the answer to either of these questions is "Yes," see detailed instructions.

Nature of Authorship Check appropriate box(es). See Instructions

☐ 3-Dimensional sculpture

☐ Map

☐ Technical drawing

☐ 2-Dimensional artwork

☒ Photograph

☐ Text

☐ Reproduction of work of art

☐ Jewelry design

☐ Architectural work

Name of Author

Date of Birth and Death

Year Born Year Died

Was this contribution to the work a "work made for hire"?

☐ Yes  
☐ No

Author's Nationality or Domestic

Name of Country

OR ☐ Citizen of  
☐ Domestic in

Was This Author's Contribution to the Work

Anonymous? ☐ Yes ☐ No

Pseudonym? ☐ Yes ☐ No

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☐ Map

☐ Technical drawing

☐ 2-Dimensional artwork

☐ Photograph

☐ Text

☐ Reproduction of work of art

☐ Jewelry design

☐ Architectural work

3

Year in Which Creation of This Work Was

Completed

2000

This information must be given in all cases.

Date and Nation of First Publication of This Particular Work

Complete this information ONLY if this work has been published.

Month Day Year

ASK 16 2001

Mail to

4

COPYRIGHT CLAIMANT(S) Name and address must be given even if the claimant is the same as the author given in space 2.

Walter G Smith  
10905 Shadow Brook Ln  
Frisco TX 75035

Transfer If the claimant(s) named here in space 4 is (are) different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright.

APPLICATION RECEIVED

FEB 26 2003

ONE DEPOSIT RECEIVED

TWO DEPOSITS RECEIVED

FEB 26 2003

FUNDS RECEIVED

MORE ON BACK

Complete all applicable spaces (numbers 5-8) on the reverse side of this page. See detailed instructions. Sign the form at line 8.

DO NOT WRITE HERE

Page 1 of 2 pages

EXHIBIT

A

tabbies



EXAMINED BY	FORM VA
CHECKED BY	
<input checked="" type="checkbox"/> CORRESPONDENCE	FOR
Yes	COPYRIGHT
	OFFICE
	USE
	ONLY

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET

**PREVIOUS REGISTRATION** Has registration for this work, or for an earlier version of this work, already been made in the Copyright Office?☐ Yes ☒ No If your answer is "Yes, why is another registration being sought? (Check appropriate box.)a. ☐ This is the first published edition of a work previously registered in unpublished formb. ☐ This is the first application submitted by this author as copyright claimant.c. ☐ This is a changed version of the work, as shown by space 6 on this application.

If your answer is "Yes, give: Previous Registration Number

Year of Registration

**DERIVATIVE WORK OR COMPILATION** Complete both space 6a and 6b for a derivative work; complete only 6b for a compilation.

a. Preexisting Material Identify any preexisting work or works that this work is based on or incorporates.

b. Material Added to This Work Give a brief general statement of the material that has been added to this work and in which copyright is claimed

**DEPOSIT ACCOUNT** If the registration fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of Account**CORRESPONDENCE** Give name and address to which correspondence about this application should be sent. Name/Address/Apt/City/State/ZIP

Walter Smith  
10905 Shadow Brook Ln  
Frisco TX 75035

Area code and daytime telephone number (972) 712 3686

Fax number (469) 633-0799

Email walt@photo.com

**CERTIFICATION** I, the undersigned, hereby certify that I am the

check only one

- ☒ author  
☐ other copyright claimant  
☐ owner of exclusive right(s)  
☐ authorized agent of

Name of author or other copyright claimant, or owner of exclusive right(s)

of the work identified in this application and that the statements made by me in this application are correct to the best of my knowledge

Typed or printed name and date If this application gives a date of publication in space 3 do not sign and submit it before that date

Walter G Smith

Date Feb 16 2003

Handwritten signature (X)

X

Certificate will be mailed in window envelope to this address.

Name	Walter Smith
Number/Street/Apt	10905 Shadow Brook Ln
City/State/ZIP	Frisco TX 75035

Complete all necessary options  
Sign your application in space 8

1. Application fee  
 2. Nonrefundable filing fee in check or money order payable to Register of Copyrights  
 3. Deposit material

Library of Congress  
 Copyright Office  
 101 Independence Avenue, S.E.  
 Washington, D.C. 20540-6000

Post no stamp to change. For correct form, check the Copyright Office website at [www.copyright.gov](http://www.copyright.gov), write the Copyright Office, or call (202) 707-6000.

17 U.S.C. § 506(e): Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409 or in any written statement filed in connection with the application, shall be fined not more than \$2,500.

JS 44 (Rev. 11/99)

## CIVIL COVER SHEET

The civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of indexing the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

## I. (a) PLAINTIFFS

Walter G. Smith d/b/a Impact Images

## DEFENDANTS

Sam's East, Inc. d/b/a Sam's Club, Inc.

(b) County of Residence of First Listed Plaintiff  
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)

Davis Munck, P.C., 13155 Noel Rd., Ste. 900, Dallas, TX 75240  
(972) 628-3600

Attorneys (If Known)

3 05 CV 1708 - M

## II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   |                                       |                            |   |                            |                                       |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
|   | PTF                                   | DEF                        |   | PTF                        | DEF                                   |
| Citizen of This State                   | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4            |
| Citizen of Another State                | <input type="checkbox"/> 2            | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3            | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6            |

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input checked="" type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <b>Habeas Corpus:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

## V. ORIGIN

- (Place an "X" in One Box Only)
- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

## VI. CAUSE OF ACTION

Brief description of cause: Copyright Infringement action.

## VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

## VIII. RELATED CASE(S) IF ANY

(See instructions)

JUDGE

DOCKET NUMBER

DATE

August 24, 2005

FOR OFFICE USE ONLY

SIGNATURE OF ATTORNEY OF RECORD

James E. Davis

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE